FOR ARGUMENT

No. 76-938

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, PETITIONERS

v.

PACIFIC MARITIME ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL MARITIME COMMISSION AND THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOSEPH N. INGOLIA,
General Counsel,
Federal Maritime Commission,
Washington, D.C. 20573.

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Three points must be kept in mind in placing the issues in this case in proper perspective.

1. There are two discrete legal questions, which respondents' arguments sometimes fuse: (a) whether the Federal Maritime Commission has any jurisdiction under Section 15 of the Shipping Act, 1916, over collective bargaining agreements; (b) whether, if it has jurisdiction, it properly exercised it over the provisions of the collective bargaining agreement involved in this case by declining to apply to those provisions a labor exemption.

2. The factual context in which these legal issues arise is as follows: the Pacific Maritime Association and the Union entered into a collective bargaining agreement that

requires employers who are not members of the Association, in order to use the joint registered work force, to observe the same terms and conditions, as set forth in the Nonmember Participation Agreement, that Association members must follow. On the basis of its analysis of the contract and the effect of that agreement upon nonmembers of the Association, the Commission concluded that "the Agreement is specifically designed to compel nonmember entities to join PMA under threat of exclusion from the ILWU work force," and "it clearly imposes terms and conditions upon persons outside the bargaining group" (Pet. App. 62a-63a; see also, *id.*, 55a-56a, 66a, 67a-69a, 70a-71a).

3. The Commission has not decided anything with respect to approval or disapproval of the agreement under Section 15 or other sections of the Act. It will decide those questions only after a hearing and further proceedings. It has decided only the threshold questions with respect to exercising its jurisdiction to examine the agreement under the standards of those sections.

I

Respondents' argument that Section 15 does not cover any provisions of any collective bargaining agreement, no matter how serious its anticompetitive effect or how adverse its impact upon Shipping Act interests may be, does not focus upon either the broad language of that section or the basic design of the Shipping Act. See our opening brief, pp. 22-27. Instead, respondents argue primarily (PMA Br. 28-34, 41-42; ILWU Br. 32, 37-47) that either the National Labor Relations Board or an antitrust court is a better qualified forum to make the judgments and evaluations necessary and appropriate to define the permissible scope of provisions in collective bargaining agreements that pose significant anti-competitive consequences for the shipping industry.

A. The Union contends (ILWU Br. 24-30, 48; see also PMA Br. 27-28) that in *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261, the Court held that Section 15 does not apply to collective bargaining agreements. It refers to the Court's statements (*id.* at 278) that the only agreement "involved" in the case was that among the members of the Association, that it was "not concerned here * * * with the collective bargaining agreement between the Association and the ILWU," that there was no claim that the latter agreement "was subject to the filing requirements of §15," and that nothing it said "is to be understood as questioning [its] continu[ed] validity."

These statements cannot bear the weight the Union ascribes to them. The Court was merely making clear that in holding that Section 15 covered the agreement among PMA members, which implemented the collective bargaining agreement, it was not deciding anything with respect to the applicability of that section to the collective bargaining agreement itself. The present case squarely presents that issue. *Volkswagenwerk* did not decide the question. As our opening brief explained (pp. 23-27), however, the rationale of that decision is inconsistent with the view that Section 15 may never cover any provision of a collective bargaining agreement, no matter how serious its anticompetitive effect may be.

B. The fact that some aspects of the Nonmember Participation Agreement may raise issues under the National Labor Relations Act that may be subject to the jurisdiction of the National Labor Relations Board does not make Section 15 inapplicable to the entire agreement. The Commission has jurisdiction to determine those issues under the agreement that are cognizable under the Shipping Act. See our opening brief, pp. 52-53. When two

statutes apply to the same subject, "the rule is to give effect to both if possible" (*United States* v. *Borden Co.*, 308 U.S. 188, 198-199). The labor aspects of anticompetitive provisions of collective bargaining agreements in the shipping industry are to be recognized and dealt with under the labor exemption of Section 15, and not by ousting the Commission of any jurisdiction over those provisions in favor of the National Labor Relations Board or an antitrust court.[1]

C. Respondent PMA contends (Br. 37, n. 31, 40) that the Commission's requirement that all agreements filed with it pursuant to Section 15 must be written and specific is inconsistent with collective bargaining procedures, which leave many understandings "vague to paper over areas where overly fine definitions might make resolution of a dispute difficult." The Act itself, however, permits the filing of memoranda describing the contents of oral agreements (Section 15, A.P. 80a).

PMA also alleges (Br. 37, n. 31) that the procedures for obtaining Commission approval of an extension of an

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[1]PMA cites (Br. 25-26) a 1941 report of a House Committee dealing with the extension of the existence of a marine labor board that Congress had created in the Merchant Marine Act of 1936, 49 Stat.1985, as amended. The Committee stated that the Board was the "only Government agency with which copies of all labor agreements are required to be filed" (H.R. Rep. No. 354, 77th Cong., 1st Sess. 2 (1941)). Of course, the views of a 1941 Congress provide little guidance concerning the intent of the Congress that enacted the Shipping Act in 1916. Moreover, this statement does not show, as PMA contends (Br. 25), that "Congress demonstrated its assumption that Section 15 was not applicable to maritime collective bargaining agreements." As we have explained (see our opening brief, pp. 37-40), not all maritime collective bargaining agreements are required to be filed with the Commission under Section 15, but only those that involve persons subject to the Shipping Act, that affect competition or otherwise meet the criteria of Section 15, and that are not subject to a labor exemption.

agreement are cumbersome.[2] The Commission, however, will extend an old agreement while the new agreement is being negotiated, and recently has done so. See Order of Approval, November 2, 1977. No. T-3007-3 (New York Shipping/Association International Longshoremen's Association).[3]

II

Respondents apparently do not question that, if Section 15 covers collective bargaining agreements, the Commission properly recognizes a labor exemption therefrom that is derived from and comparable to the labor exemption this Court has recognized under the antitrust laws. They argue, however, that the Commission erroneously denied a labor exemption to the Nonmember Participation Agreement.

A. Both respondents contend (PMA Br. 4-14, 47-49; ILWU Br. 16-21, 35-36, 42-46) that the Nonmember

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[2]PMA refers (Br. 36-37) to the Commission's alleged delay in granting interim and final approvals. The Commission, however, has moved quickly when the parties requested such action. See Agreement No. T-3007, New York Shipping Ass'n/ILA Assessment Agreement (November 1, 1974) (agreement filed September 30, 1974, interim approval granted November 1, 1974); New York Shipping Association Cooperative Working Arrangement, FMC Docket No. 69-57 (filed February 26, 1970, interim approval granted March 11, 1970).

PMA also claims (Br. 40) that the Commission would replace the labor arbitrator and labor grievance procedures. Agreements that Section 15 covers, however, regularly contain self-policing provisions, including procedures for handling grievances (See 46 C.F.R. 522.6).

[3]The union contends (ILWU Br. 38) that, unlike PMA, it would not benefit from the antitrust exemption that Commission approval of an agreement under Section 15 would provide, because it is not subject to the Act. The immunity that Section 15 provides for agreements the Commission has approved, however, is for the agreement itself, not just for the parties to it (A.P. 82a).

Participation Agreement is entitled to a labor exemption because the Union has an interest in the integrity and work opportunities of the registered work force and in the fringe benefits the Agreement covers. There is no question that the Union has such an interest. The Union unilaterally could demand from nonmembers of PMA whose employees it represents the same terms it undertook to require under the agreement.

The question is whether the Union properly may implement that interest through an agreement with PMA under which the latter and the Union jointly undertake to control the terms and conditions of employment for employees of nonmembers of PMA who are in a different bargaining unit. Such a combination is not exempt from the laws regulating competition. *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 622-623; *United Mine Workers of America* v. *Pennington,* 381 U.S. 657, 665-666; *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 173.

The Nonmember Participation Agreement is competitively advantageous to PMA. It avoids the possibility that nonmembers would be able to undercut PMA members' charges because of lower labor and fringe benefit costs and their ability to continue to operate if the Union struck PMA members. The president of PMA stated: "This creates an obvious competitive disadvantage to PMA members" (App. 90; see also App. 102, where a vice president of PMA explained that "the PMA members are at a competitive disadvantage where nonmembers enjoying the benefits of the contract can get favored treatment in regard to the utilization of the workforce, the employment of steady men, the privilege of working when members cannot, and even going so far as to take advantage of that latter situation and handle cargo which would otherwise be handled by members during strike or stoppage periods.") As the Commission pointed out (A.P. 55a-56a), "PMA itself readily admits that the purpose of

the supplemental agreement is to * * * place nonmembers on the same 'competitive' basis as members of the PMA."

The Union states that it agreed to certain terms concerning the employment of its men by nonmembers of PMA "reflect[ing] some of PMA's interest" as a *quid pro quo* for "PMA benefits [being] made available to *all* employees no matter for whom they worked" and that this reciprocity entitled the entire agreement to a labor exemption (ILWU Br. 20-21, 35-36). In view of the existing institutions on the West Coast for the employment of longshoremen, some agreement on the access of nonmembers to joint PMA/ILWU and PMA-operated programs and facilities is necessary. Further, members of a multi-employer bargaining unit may insist that they receive any more favorable terms that the Union negotiates with their competitors. *Dolly Madison Industries, Inc.,* 182 NLRB 1037, 1038.

It does not follow, however, that an employer group such as PMA may join with the Union in imposing employment terms and conditions upon employers and employees outside the group. Whatever may be the permissible limits of unilateral union action leveling wage competition, a union-employer combination reaching outside the bargaining unit to regulate employment terms of third parties is not exempt from the antitrust laws. *United Mine Workers of America* v. *Pennington, supra,* 381 U.S. at 665-666.

B. Respondents argue that the Commission's finding that the Revised Agreement "has * * * a potentially severe and adverse effect upon competition" (A.P. 70a) was inadequate because the Commission failed to make a "finding that the terms under attack constituted serious antitrust violations" (PMA Br. 18, 22-23, 43-41; ILWU Br. 31-32). They also complain that the Commission failed to find that any higher costs to nonmembers

resulting from the Revised Agreement would alter "rates or charges subject to Shipping Act regulation or creat[e] discriminatory rates" (PMA Br. 22). These contentions rest on two fallacies: that only an impact on rates would affect Shipping Act interests; and that a violation of the antitrust laws or the Shipping Act must be found before an exemption can be denied.

1. The Shipping Act covers a wide range of competitive relationships in the maritime industry. Section 15 broadly requires filing of any agreement "controlling, regulating, preventing, or destroying competition." The statutory criteria for approval relate not only to antitrust considerations, as incorporated in the "public interest" standard (see Pet. Br. 33), but to any form of unjust discrimination or unfairness, detriment to the commerce of the United States, other injury to the public interest, or violation of other provisions of the Act. Shipping Act values are deeply implicated in this case, particularly by the ports' allegations that the agreement is an attempt to control competition by nonmembers in a manner contrary to the public interest, and that the agreement may result in unjust discrimination among rival ports.

2. Denial of a labor exemption from Section 15 does not require a finding that an agreement violates the Shipping Act or the antitrust laws. In *Connell Construction Co., supra,* this Court found the agreement involved was not exempt, and then remanded the case for a determination whether it violated the Sherman Act. 421 U.S. at 637. Indeed, the reason for a preliminary determination whether there is an exemption is to avoid what may turn out to be lengthy and unnecessary litigation of the substantive issues. It was to avoid just such litigation that the Commission here severed for separate determination the exemption question from the issues under the Shipping Act (App. 21-24). The issues of violation of the Shipping Act and the antitrust laws need be reached only if there is no labor exemption.

Contrary to respondents contention (PMA Br. 44; ILWU Br. 31), the Commission properly concluded that the Revised Agreement would have serious anticompetitive effects. The Commission not only discussed the adverse effects that would result if a nonmember refused to sign the agreement, but also analyzed the adverse effects upon Shipping Act interests if the nonmember signed the agreement. The Commission found that nonmembers who signed the Revised Agreement would incur higher costs (A.P. 67a-68a), because that agreement would require nonmembers to participate in PMA fringe benefit programs, to observe PMA labor policies if the Union caused a work stoppage, to use steady men in the same manner as PMA members, and generally to "share in the * * * joint work force upon the same terms as apply to members of PMA" (A.P. 63a-65a). It also noted that PMA "readily admits that the purpose of the supplemental agreement is to do away with the 'free ride' previously enjoyed [by nonmembers] * * * and to place nonmembers on the same 'competitive' basis as members of PMA" (A.P. 55a-56a).

CONCLUSION

For the foregoing reasons and for those in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOSEPH N. INGOLIA,
General Counsel,
Federal Maritime Commission.

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